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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-815

NORTHWEST POWER PRODUCTS, INC.,
Petitioner,

v.

OMARK INDUSTRIES, INC., Bob Wooten, and BOSCO FASTENING SERVICE CENTER, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1978

No. 78-815

Northwest Power Products, Inc.,
Petitioner,

v.

Omark Industries, Inc., Bob Wooten, and
Bosco Fastening Service Center, Inc.,
Respondents.

Petition For A Writ of Certiorari To The
United States Court of Appeals
For The Fifth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

The decisions below in this case raise no new or significant issues. The District Court granted respondents' motion for summary judgment holding that the substitution of one company for another as a distributor of a manufacturer's products, accompanied by alleged acts of unfair competition against the former distributor, did not violate Section 1 of the Sherman Act. The Court of Appeals unanimously affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

There is, and has been, only one dispositive issue in this case:

Whether the substitution of one company for another as a distributor of a manufacturer's products, accompanied by alleged acts of unfair competition, violate the provisions of Section 1 of the Sherman Act.

COUNTERSTATEMENT OF THE CASE

The statement of the case in Northwest Power Products, Inc.'s petition includes a melange of facts unsupported in the record, and includes references to matters which were expressly excluded from the record on appeal.[1]

The "facts" set forth by Petitioner come almost entirely from its complaint, its own answers to interrogatories and the deposition of its president Raymond McElroy and are in reality contentions and suspicions, not facts. Although respondents vigorously dispute much of the analysis of the "evidence" presented in Northwest's petition, a detailed analysis and response to that statement of facts is unnecessary here, as it was in the trial court, because respondents acknowledged that, for purposes of the summary judgment motions, all historical facts pleaded by petitioner in its complaint (R. 1-7, App. 6-12) or in the pre-trial order (R. 121-124, App. 100-103) were to be taken as true (R. 117,

[1]For example, petitioner's entire statement of "Public Injury and Adverse Effect on Competition" (Petition 17-18) is based upon affidavits of Raymond McElroy and George Witten, obtained and filed more than 30 days *after* the trial court entered its order sustaining the motions for summary judgment. Although included in the transcript, the trial court properly refused to certify the affidavits as a part of the record on appeal. (Supp. R., ITEM "1" at 2, App. 154).

App. 96). Respondent's position is that even if one accepts these contentions as true, no violation of the antitrust laws has been demonstrated.

The facts which were admitted for purposes of the motions for summary judgment and the appeal below are: (i) Northwest was an Omark distributor prior to March 20, 1974; (ii) Omark terminated Northwest's distributorship and awarded it to Bosco; (iii) in connection with the substitution of distributors, Wooten was disloyal to Northwest, was fired by Northwest, and was hired by Bosco approximately one month later; (iv) Bosco hired two salesmen and a clerical worker employed by Northwest; (v) the clerical worker took a customer list with her to Bosco; and (vi) Bosco salesmen, after the distribution substitution, made disparaging remarks to certain customers of Northwest.

Petitioner has, in its statement of facts, argued the existence of a substantial competitive relationship between Omark, Northwest and Bosco prior to the substitution of distributors. (Petition 6). There is no competent evidence in the record to support these "facts" and the evidence is directly to the contrary. Any direct sales activity conducted by Omark was sporadic, infrequent, and was stopped prior to termination of Northwest's distributorship. (McElroy 301-03, App. 232-239; 305-6, App. 236-237; 350, App. 240; 355, App. 245; Wright 60-64, App. 360-364). Bosco was never named as a competitor by McElroy, and there is no evidence of any competition between Bosco and Northwest prior to the substitution of Bosco for Northwest.

The Court of Appeals properly noted that the existence of a competitive relationship between petitioner and Omark is not significant for purposes of antitrust analysis. The crucial question is whether Omark possessed sufficient

power in the market to eliminate competition in general, rather than just one competitor. The summary judgment evidence clearly indicated that Omark lacked the kind of market power to affect the competitive forces protected by the Sherman Act.

REASONS FOR DENYING CERTIORARI

I. THE COURT OF APPEALS APPLIED WELL SETTLED PRINCIPLES OF LAW IN HOLDING THAT THE TERMINATION OF A DISTRIBUTOR, ACCOMPANIED BY ALLEGED ACTS OF UNFAIR COMPETITION, DOES NOT VIOLATE THE SHERMAN ACT.

The decisions of the courts below reflect a clear and reasoned application of a well-settled principle: the termination of a distributor, even if accompanied by alleged acts of unfair competition, does not violate the Sherman Act.

The law is settled that a manufacturer may terminate its relationship with one distributor and sell its product to another without violating the Sherman Act. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Burdett Sound Inc. v. Altec Corp.*, 515 F.2d 1245, 1248 (5th Cir. 1975); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119 (9th Cir. 1972); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, 286 (6th Cir. 1963).

The fact that the termination was accompanied by alleged unfair trade practices will not convert the claim into a violation of the Sherman Act. This principle has been firmly established in the Fifth Circuit, and has been followed in others. *See, e.g., Burdett Sound Inc. v. Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975); *Bushie v. Stenocord*

Corp., 460 F.2d 116 (9th Cir. 1972); *Roth Office Equipment Co. v. G. F. Business Equipment Co.*, 1975-2 Trade Reg. Rep. (CCH) ¶ 60, 563 (S.D. Ohio 1975).

II. THE HOLDING OF THE COURT OF APPEALS IS CORRECT AND IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR THE COURTS OF APPEALS.

Petitioner argues that the Court of Appeals repudiated 45 years of judicial history by refusing to follow the decision of the First Circuit in *Albert Pick-Barth v. Mitchell Woodbury Co.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932). Contrary to petitioner's argument, *Pick-Barth* has been repudiated in the First Circuit itself.

In *Pick-Barth*, the First Circuit held that a conspiracy to eliminate a competitior by acts of common law unfair competition constituted a per se violation of Section 1 of the Sherman Act. The *Pick-Barth* theory of liability was followed by one other circuit, *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966).

In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), the First Circuit vitiated the original holding of *Pick-Barth* and limited the Pick-Barth decision to its facts: "an effort by a defendant which was a significant factor in the market to eleminate a competitor." *Id.* at 562. Significantly, the court held:

> Insofar as *Pick-Barth* and *Atlantic Heel* may be said to stand for the broad proposition that unfair competitive practices accompanied by an intent to hurt a competitor constitute per se violations of the antitrust laws, we do not now accept their teaching.

Id. at 562.

In *Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), the Tenth Circuit, faced with very similar arguments presented by Petitioner, held that its decision in *Perryton Wholesale* did not apply to cases involving a substitution of distributors.

The more recent district cases have followed the current decisions in the First and Tenth Circuits and have rejected the *Pick-Barth per se* rule in its entirety. *Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc.*, 443 F.Supp. 639 (N.D. Fla. 1977); *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc.*, 430 F. Supp. 1234, 1241 (N.D. Iowa 1977); *Associated Radio Service Co. v. Page Airways, Inc.*, 414 F. Supp. 1088, 1091-94 (N.D. Tex. 1976); *Mar Food Corp. v. Doane*, 405 F. Supp. 730 (N.D. Ill. 1975).

The Court of Appeals correctly noted that the *Pick-Barth* doctrine fails to perceive the inherent problems in adopting a *per se* rule based upon the common law of unfair competition. First, by its very nature, a claim of unfair competition fails to draw the bright line of illegality which is essential if a *per se* rule is to achieve its purpose in business planning. Second, and perhaps as important, there is no federal law of unfair competition; the laws of the states control and, in fact, differ on the elements required. Petitioner apparently recognizes this problem by indirectly suggesting that the court should adopt a federal common law of unfair competition. (Petition 40). *Pick-Barth* is, at best, an anomaly in the field of antitrust jurisprudence, and more likely, in the words of one court, an "aberration"[2] that has been repudiated by the Court of Appeals that decided it, and should not be revived.

The Court of Appeals correctly noted that the decisions applying *Pick-Barth* have never analyzed whether transactions, such as those forming the basis of petitioner's claim have any anticompetitive effect on the marketplace. *Pick-Barth* has been severely criticized because the doctrine forecloses any examination of the economic effects of the challenged acts.[3] In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court held that departure from the rule of reason standard "must be based upon demonstrable economic effect . . . ." *Id.* at 59. Petitioner failed to produce any facts which would demonstrate any anticompetitive effect in the market. In fact, from the data developed through deposition testimony, the Court of Appeals concluded that there was none. 576 F.2d at 91. Petitioner demonstrated no more than a one-for-one substitution of distributors and, therefore, *per se* analysis would be highly inappropriate under the rationale of *GTE Sylvania*.

[2]Southland Reship, Inc. v. Flegal, 401 F.Supp. 339, 347 (N.D.G.A. 1975).

III. PETITIONER FAILED TO DEMONSTRATE A VIABLE ANTITRUST CLAIM UNDER THE RULE OF REASON STANDARD.

Petitioner alleges that even if its "proof" falls short of the *per se* requirements, it nevertheless is entitled to demonstrate that the challenged acts constitute unreasonable restraints of trade. (Petition 52-53). Petitioner argues that its business has been rendered unprofitable and that the "effect" of the unfair competitive acts was to eliminate a service organization. (Petition 57).

Petitioner's burden, in the face of a motion for summary judgment, was to support its claimed legal theory by "sig-

[3]Yoerg, *Should a Trade Secrets Misappropriation Claim Lie in a Procrustean Antitrust Bed?*, 22 Antitrust Bull. 1 (1977); Comment, *A Reexamination of Pick-Barth Per Se Illegality Under Section 1 of the Sherman Act*, 38 U. Pitt. L. Rev. 87 (1976).

nificant probative evidence." *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). Significantly, this Court stated the rationale succinctly:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

391 U.S. at 290. The Court of Appeals properly noted that petitioner failed to establish any probative evidence suggesting injury to competition. In fact, the evidence proffered by petitioner disclosed that the challenged acts enhanced competition in the sales by PATS in the Dallas-Ft. Worth market by the addition of a new distributor of PATS. 576 F.2d at 91.

CONCLUSION

Petitioner has failed to demonstrate any significant issue justifying the issuance of a Writ of Certiorari. The Court of Appeals applied well settled principles of antitrust jurisprudence in rejecting the *per se* analysis suggested by *Pick-Barth*. For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 15, 1978

CERTIFICATE OF SERVICE

I, Jerry L. Buchmeyer, a member of the Bar of the Supreme Court of the United States, certify that three copies of the foregoing Joint Brief in Opposition have been served upon counsel for Petitioners by United States Mail, first class, postage prepaid. I further certify that all parties required to be served have been served.

December 15, 1978.

/s/ JERRY L. BUCHMEYER

Jerry L. Buchmeyer